(21,075.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 105.

ALFRED DOZIER, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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a ALFRED DOZIER, Plaintiff in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

1 THE STATE OF ALABAMA,
Montgomery County:

Be it remembered that at a term of the City Court of Montgomery begun and holden for said Court at the Court house in the City of Montgomery, State and County aforesaid, on the first Monday in October in the year of our Lord, One Thousand Nine Hundred and Seven, it being the seventh (7th) day of said month—present the Honorable W. H. Thomas, Associate Judge Presiding in the Criminal Division of said Court—the following proceedings were had and the following judgments were rendered, towit:

STATE OF ALABAMA,
Montgomery County:

Before me, B. C. Young, a Justice of the Peace in and for said County, personally appeared George Lamar who being first duly sworn, deposes and says, on oath, that in said County on or about Nov. 1st, 1907, one Alfred Dozier did engage in or carry on the business of soliciting orders for the enlargements of photographs or of selling or disposing of picture frames without a license and contrary to law against the peace and dignity of the State of Alabama.

GEO. M. LAMAR.

Sworn to and subscribed before me, this 29th day of Nov. 1907.
B. C. YOUNG, *J. P.*

2 THE STATE OF ALABAMA,
Montgomery County:

To any lawful officer of said county, Greeting:

You are hereby commanded to arrest Alfred Dozier and bring him before The Honorable Judge of the County Court of Montgomery to answer the State of Alabama of a charge of engaging in or carrying on the business of soliciting orders for enlargement of photographs and disposing of picture frames without a license, and have you then and there this writ, with your return thereon.

Witness my hand this the — day of ——, A. D. 190–.

B. C. YOUNG, *J. P.*

THE STATE OF ALABAMA,
Montgomery County:

County Court, December Term, 1907.

1176.

THE STATE
v.
ALFRED DOZIER.

Charge, Doing Business Without a License.

I. M. S. Gilmer, Clerk of the County Court of Montgomery County in and for said County and State, do hereby certify that the said defendant Alfred Dozier was convicted in said Court of said offense at said term and the following punishment was awarded by the Court, a fine of $75.00 and the costs of the proceedings. And defendant being dissatisfied with said decision in said case asked for and was granted an appeal to the present term of the city court of Montgomery, State aforesaid and have bond as required by law.

Witness my hand at my office, in the City of Montgomery, Alabama, on this the 2nd day of December, A. D. 1907.

M. S. GILMER,
Clerk of the Court of Montgomery County.

Filed in my office this the 10th day of December A. D. 1907.
H. N. HUGHES, *Clerk.*

3 In the City Court of Montgomery, on Appeal from County Court.

STATE OF ALABAMA,
Montgomery County:

The State of Alabama, by its Solicitor complains of Alfred Dozier, that within twelve months before the commencement of this prosecution he did engage in or carry on the business of soliciting orders for the enlargement of photographs or of selling or disposing of picture frames without a license and contrary to law against the peace and dignity of the State of Alabama.

S. H. DENT, JR.,
Solicitor for Montgomery Co. Ala.

Filed in office December 14th, 1907.
H. N. HUGHES, *Clerk.*

SATURDAY, *December* 14*th, A. D.* 1907.

Court met pursuant to adjournment.
Present: The Hon. W. H. Thomas, Associate Judge presiding.

3900.

THE STATE
v.
ALFRED DOZIER.

Charge: Violating Revenue Law.

This the 14th day of December 1907, came S. H. Dent, Jr., Solicitor who prosecutes for the State of Alabama, and came also the defendant in his own proper person and by attorney, and the said defendant being duly arraigned upon the complaint in this cause for his plea thereto says he is not guilty. Thereupon came a jury of good and lawful men towit: John Smith and eleven others who being duly empaneled and sworn according to law, upon their oaths do say: "We the jury find the defendant guilty as charged, and assess a fine of $75.00."

It is therefore considered and adjudged by the Court that the said defendant is guilty as charged in the complaint in this cause, and the said defendant being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him says nothing. It is therefore considered by the Court and it is the judgment and sentence of the Court that the said defendant perform Hard Labor for Montgomery County for a term of
4 thirty days in payment of said fine and the costs of this prosecution not being presently paid or otherwise secured and the same being now ascertained and amounting to $50.60, it is therefore further considered and ordered by the Court that the said defendant perform Hard Labor for Montgomery County, for the term of one hundred and sixty-eight days in payment of said costs at the rate of 30¢ per diem, making in all one hundred and ninety eight days. During which said defendant is to perform Hard labor for Montgomery County beginning from this day and ending on the 30th day of June 1908.

And questions of law arising in this case for the decision of the Supreme Court of Alabama, and on motion of the defendant it is considered and ordered by the Court that this sentence be and the same is hereby suspended pending the defendant's said appeal to said Supreme Court.

And it is further ordered by the Court that pending said appeal the said defendant may be admitted to bail in the sum of One Hundred and fifty Dollars.

STATE OF ALABAMA,
Montgomery County:

In the City Court of Montgomery, Oct. Term, 1907.

THE STATE
v.
ALFRED DOZIER.

Be it remembered, That at the October Term 1907 of the City Court of Montgomery, the following among other proceedings were had:

It was agreed between the parties that the following were the facts of the case upon which the defendant was to be tried. This agreement was reduced to writing and is in words and figures as follows:

That Section 17 of An Act of the Legislature entitled "An Act to further amend Revenue Laws of the State of Alabama, reads as follows:

SECTION 17. That each person, firm or corporation either in person or through agents who solicit orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not, or any person, firm or corporation either in person or through agents, who sells or dispose of picture frames shall pay a license tax of twenty five dollars in each county in which they do business; that this Act shall not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade.

That the defendant, Alfred Dozier, is now and has been the agent of the Chicago Crayon Company for the purpose of delivering pictures and frames and collecting the money therefor the orders for which pictures and frames have previously been taken by other agents of the Chicago Crayon Company; that the said Chicago Crayon Company is a corporation of the State of Illinois, its only place of business being in the City of Chicago, State of Illinois; that it is engaged in the business at Chicago of making and enlarging portraits in oil, india ink, water color and pastel from photographs, and in the manufacturing of picture frames; that in the prosecution of its business, the said Company has agents travelling in the State of Alabama, and other States, who solicit orders, which orders are the same as the one attached hereto and marked "Exhibit A" and made a part hereof, and is signed by the customer and witnessed by the agent. Upon securing this order the agreement marked Exhibit "B" attached hereto and made a part hereof is signed by the agent and turned over to the party giving the order and a duplicate is forwarded to the Company at Chicago.

When the portrait ordered is ready for delivery a notice is sent to the person who has ordered the same, and the portrait and frame are shipped from Chicago to the place where they are to be delivered, consigned to the Chicago Crayon Company and are received and receipted for the agent of the Company, that all orders are taken,

executed, shipped and delivered in the name of the Company and the pictures and frames remain the property of the Company until delivered and collected for. The defendant has since March 7th, 1907, in the County of Montgomery as agent for the Chicago Crayon Company, been engaged in the business of delivering pictures and frames and collecting therefor as above set out in the manner
6 and way as above stated.

Neither the defendant nor the Chicago Crayon Company have a permanent place of business in the State of Alabama, keeping the picture frames as a part or all of their stock in trade. Neither the defendant nor the Chicago Crayon Company have paid the license tax of $25.00 provided for in Section 17 of the Act of the Legislature entitled, "An Act to further amend the Revenue Laws of the State of Alabama." Approved March 7th, 1907.

Exhibit "A" above referred to is in words and figures as follows:

No. —. Date, —— —, —.
Name, —— ——.
Address, ——.
Size, — Kind — Price, —.
Remarks. ——.
——.

Post Office, ——. Date, —— —, 190-.

I, the undersigned, hereby order from the Chicago Crayon Company — oil, Pearl, Sepia, Pastel, Crayon, Bromide Portrait, unframed, size — for which I agree to pay $— when delivered. I also understand that my portrait is to be delivered in an appropriate frame which this contract entitles me to accept at factory price.

Signed. —— ——, *Customer.*

Witness:
—— ——, *Salesman.*

Exhibit "B" above referred to is in words and figures as follows:

Contract.

On or about —— —, 190-, we agree to deliver to —— ——, the holder of this contract, a finely finished —— Portrait, unframed, as shown by our salesman. The purchaser agrees to
7 pay $— for the portrait when delivered. All portraits are delivered in appropriate frames, which this contract entitled the purchaser to accept at factory prices. Elegant patterns that retail from $4.00 to $8.00 we furnish from $1.50 to $5.90 which is one-third to one half the usual prices.

Kindly remember the date of delivery and have money ready, as our deliveryman can make but one call to collect charges for same. Please be at home or leave the money with the nearest neighbor.

Signed. ——,
Advertising Salesman, Chicago Crayon Co.

Groups extra.

This was all the evidence.

The defendant then asked the Court in writing to give the following charge. "The Court charges the jury that if they believe the evidence, they must find the defendant not guilty." Which charge the Court refused to give, to which refusal the defendant duly and legally excepted.

The Solicitor for the State asked the Court to give the Jury the following charge. "The Court charges the jury that if they believe the evidence beyond a reasonable doubt, they must find the defendant guilty," to the giving of which charge the defendant duly and legally excepted.

Defendant now tenders this, his bill of exception, which is signed by the Hon. Wm. H. Thomas, Associate Judge of the City Court of Montgomery, who presided at the trial of said case, within the time prescribed by law and the order of the Court.

Done this 17th day of December, 1907.

WILLIAM H. THOMAS,
Associate Judge of the City Court.

8 Filed in Office December 17th, 1907.
H. N. HUGHES, *Clerk.*

THE STATE OF ALABAMA,
Montgomery County:

I, H. N. Hughes, Clerk of the City Court of Montgomery, in and for said State and County, do hereby certify that the foregoing pages numbered from one to eight inclusive contain a full, true and complete transcript of the record and proceedings of said Court in a certain cause lately therein pending wherein The State of Alabama was plaintiff and Alfred Dozier was defendant, as fully and completely as the same appears of record in said Court.

And I further certify that the said defendant did on the 14th day of December 1907 pray for and obtain an appeal from the judgment of said Court to the Supreme Court of Alabama, to reverse said judgment of said Court.

Witness my hand this the 19th day of December 1907.

H. N. HUGHES,
Clerk of the City Court of Montgomery.

9 *Minutes of Supreme Court of Alabama.*

(Minute Book 59, p. 130.)

November Term, 1907-8.

DECEMBER 19TH, 1908.

3 Div., 763.

ALFRED DOZIER
vs.
THE STATE OF ALABAMA.

Come the parties by attorneys, and submit this cause on briefs for decision.

Minutes of the Supreme Court of Alabama.

(Minute Book 59, p. 243.)

November Term, 1907-8.

FEBRUARY 13TH, 1908.

3 Div., 763.

ALFRED DOZIER
vs.
THE STATE OF ALABAMA.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the City Court.

10 Feb. 13, 1908.

STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1907-8.

3 Div., 763.

ALFRED DOZIER
v.
THE STATE OF ALABAMA.

Appeal from Montgomery City Court.

DENSON, *J.:*

Section 17 of an act of the Legislature, approved March 7th, 1907, and entitled, "An Act to further amend the Revenue Laws of the State of Alabama," reads as follows:

"SECTION 17. That each person, firm or corporation either in person or through agents, who solicits orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not, or any person, firm or corporation either in person or through agents, who sells or disposes of picture frames, shall pay a license tax of twenty-five dollars in each county in which they do business; that this Act shall not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade."—Acts, 1907, p. 455.

The defendant was arrested under a warrant issued on an affidavit sued out before a justice of the peace, charging him with a vio-
11 lation of this law, the warrant being made returnable to the County Court of Montgomery County. The defendant was tried in said Court and convicted, and from the judgment of conviction he appealed to the City Court of Montgomery. In the City Court the solicitor filed a complaint which is in the following language:

"The State of Alabama, by its solicitor complains of Alfred Dozier, that within twelve months before the commencement of this prosecution he did engage in or carry on the business of soliciting orders for the enlargement of photographs or of selling and disposing of picture frames without a license and contrary to law against the peace and dignity of the State of Alabama.

S. H. DENT, JR., *Solicitor.*"

From a judgment of conviction rendered by the City Court this appeal is taken.

The cause was tried on an agreed statement of facts, which is fully set out in the record.

It is conceded that the defendant cannot be convicted for de-

livering the pictures, because the taking of the orders therefor and the delivery in pursuance of the order contracts, in the manner shown by the statement of facts, is interstate commerce. But the insistence of the State is, that the sale of the frames for the pictures was made and completed in Alabama, by the agent, after they came into the State and while in possession of the agent and, therefore, that the transactions in respect to the frames were not *interstate*, but *intrastate* commerce, and that the conviction should be sustained under the latter alternative in the complaint.

The precise question presented by this insistence has never been passed upon by the Supreme Court of the United States, so far as we are advised. The cases decided by that Court, which are cited and relied on by the appellant, show in the statement of the facts that the written contracts for the goods were made out and completed by the soliciting agent, with nothing remaining to be done by the delivering agent, but to deliver the goods—as was the case in respect to the contracts for the pictures in the instant case. In other words, the contracts were completed, between the pur-
12 chaser and the soliciting agent acting for the company, in such way as made them binding on both parties and of enforceable efficiency by either party upon compliance with its terms.—See brief of appellant's counsel for the cases.

In the case in judgment, it appears, from the statement of facts, that upon securing the orders for portraits (in form as shown by Exhibit A to said statement), which orders are signed by the customer and witnessed by the agent, an agreement (in form as shown by Exhibit B to said agreed statement of facts) is signed by the agent, acting for the company, and left with the customer, and a duplicate thereof is forwarded to the company in Chicago.

Construing the two exhibits together, it seems to us clear of doubt that no sale was made by the soliciting agent, of the frame. The purchaser is not bound by the terms of either of the Exhibits to accept any pay for a frame, and the extent of the meaning of the two is, that an opportunity will be afforded the purchaser, at the time the portrait is delivered, to purchase a suitable frame: so that the minds of seller and purchaser do not concur in the consummation of a sale-contract, in respect to the frame, until the delivering agent has exhibited the frame, with its price, and the purchaser accepted it at the price. It is at that time the sale is consummated and not before.

It is true that the Supreme Court of South Carolina (in the cases of *State v. Coop*, reported in 41 L. R. A., 501, and *City of Laurens v. Elmore*, 55 S. C. 477) has decided the question contrary to the conclusion we here reach; and that Judge Speer, United States District Judge, in the case of *Chicago Portait Company v. Mayor etc. of the City of Macon* (147 Fed. Rep. 967), adopted the reasoning employed in the *Coop case, supra*, and reached the same conclusion as was arrived at in that case. But the United States District Court is not a court of last resort; and we are not impressed nor persuaded by the reasoning employed by the South Carolina court, but prefer to accept and follow that of the Supreme Court of Maine, in the case of

State v. Montgomery (43 Atl. Rep. 13), and that of the Supreme Court of Georgia, in the case of *Chrystal v. Mayor etc. of the*
13 *City of Macon* (33 S. E. Rep. 810), in which cases the same conclusion was reached that we here announce.

The sale of the frames, in the manner and under the circumstances disclosed by this record, did not constitute *interstate commerce.*

There is no merit in the contention that the law is in conflict with the Federal Constitution, in that it discriminates in favor of merchants having a parmenent place of business as against merchants residing without the State. It is too clear for argument, that any merchant, whether he resides in the State or out of it, may be exempt from the license, provided he has a permanent place of business in the State and keeps picture frames as a part or all of his stock in trade. In other words, this condition or exception applies to all alike, whether residents or non-residents; and there can be no discrimination where this is true.

Construing the bill of exceptions most strongly against the exceptor, as the rule requires shall be done (*McGehee's* case, 52 Ala. 224), it must be held that the court committed no error in giving the general affirmative charge with hypothesis requested by the State, nor in refusing that requested by the defendant.

Affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

14 STATE OF ALABAMA,
Montgomery County:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing 13 pages, contain a true and complete copy of the record and proceedings and opinion of said Court, in the case of Alfred Dozier, Plaintiff in error *vs* The State of Alabama, Defendant in error, as the same remains of record and on file in this office.

In testimony whereof, I have caused the seal of said Court to be affixed, in the City of Montgomery, County of Montgomery and State of Alabama, on this the 6th day of March, 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

15 UNITED STATES OF AMERICA,
State of Alabama, ss:

I, John R. Tyson, Chief Justice of the Supreme Court of Alabama, in the State of Alabama, hereby certify that Robert F. Ligon, who signed the above certificate was at the time of signing the same, and is now, Clerk of the said Supreme Court of Alabama, duly commissioned and qualified. That said Court is a Court of record, having a Clerk and Seal. That said attestation is in due form, and by

the proper officer, according to the laws of the State of Alabama, and that the above signature of said Clerk is genuine.

Witness my hand and seal at Montgomery, Montgomery County, Alabama, this 12th day of March, A. D. 1908.

[Seal of the Supreme Court of Alabama.]

JNO. R. TYSON, [SEAL.]
Chief Justice of the Supreme Court of Alabama.

UNITED STATES OF AMERICA,
State of Alabama, ss:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, said Court being a Court of record, do hereby certify that the Honorable John R. Tyson, whose name is subscribed to the annexed and foregoing certificate, was at the time of the signing thereof, and now is, one of the Judges and Chief Justice of said Supreme Court of Alabama, duly elected, commissioned and qualified, and that his signature is genuine.

In witness whereof I have signed my name and affixed the seal of said Supreme Court of Alabama, at my office in the City of Montgomery, in the County of Montgomery, State of Alabama, this 12th day of March, A. D. 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

16 UNITED STATES OF AMERICA,
State of Alabama:

In the Supreme Court of Alabama.

ALFRED DOZIER, Appellant,
vs.
STATE OF ALABAMA, Appellee.

Petition for Writ of Error.

To theHonorable Judges of the Supreme Court of the State of Alabama:

Your petitioner, Alfred Dozier respectfully shows that on the 13th day of February, 1908, this Honorable Court rendered a judgment affirming a judgment of conviction rendered against your petitioner in the said City Court of Montgomery in a cause wherein your petitioner was defendant and the State of Alabama Plaintiff, said judgment of conviction being for the sum of $75.00, together with costs amounting in all to $120.60 *Dollars*, and in legal effect, awarded execution thereon, as will appear by reference to record and proceedings in said cause: that the said Supreme Court of Alabama is the highest court in the State of Alabama in which decision of said cause can be had: that in said cause the State of Alabama prosecuted your

petitioner for delivering or selling picture frames, the property of the Chicago Crayon Company, a foreign corporation, whose only place of business is located at Chicago, in the State of Illinois, without a license, as required by Section 17, of an Act of the Legislature of Alabama, approved March 7th, 1907, and entitled:—

"An Act to further amend the Revenue laws of the State of Alabama."

and your petitioner relied on the defense that in disposing of the picture frames, in the manner, and under the circumstances shown by the evidence was Interstate Commerce, and that the said statute of Alabama was unconstitutional and void, being an interference of Interstate Commerce and therefore violative of Article first, Section 8 of the Constitution of the United States, and your petitioner further relied on the defense that the said statute of Alabama discriminated against merchants and dealers having their principal place of business without the State and that said statute was therefore violative
17 of Article 14 of Section 1 of the Constitution of the United States: that said judgment of conviction of your petitioner in the said city court of Montgomery and the judgment of affirmance by this Court is in conflict with, and contrary to the said Article 1, Section 8, and Article 14, Section 1 of the Constitution of the United States.

Wherefore, your petitioner is aggrieved, and prays for a writ of error with citation and supersedeas, returnable to the Supreme Court of the United States, and prays that said writ of error be allowed, and that a transcript of the record and proceedings in said cause, including the said final judgment therein, duly authenticated, may be sent to the said Supreme Court of the United States, as provided by law, and that such other and further proceedings may be had as may be proper in the premises, and also prays that an order be made, fixing the amount of surety, which your petitioner shall give and furnish upon said writ of error; that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And in duty bound, petitioner will ever pray, etc.

ALFRED DOZIER,
Petitioner.

A. D. GASH,
HILL, HILL & WHITINGS,
Attorneys for Petitioner.

18 In the Supreme Court of Alabama.

ALFRED DOZIER, Appellant,
vs.
THE STATE OF ALABAMA, Appellee.

Order Granting Writ of Error.

On this, the 28th day of February, 1908, came the appellant, by his attorney, in due time, and filed herein, and presented to the

Court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Honorable the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the security now being offered by appellant, and approved, the said petition has this day been duly allowed, and it is therefore, ordered that upon the filing of the said bond, with the Clerk of this Court in the sum of Five Hundred Dollars, it shall operate as a supersedeas, and all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ or error by the said Supreme Court of the United States.

Dated this the 28th day of February, 1908.

JNO. R. TYSON,
Chief Justice of the Supreme Court of Alabama.

19 In the Supreme Court of Alabama.

ALFRED DOZIER, Appellant,
vs.
THE STATE OF ALABAMA, Appellee.

I, John R. Tyson, Chief Justice of the Supreme Court of Alabama, presiding therein at the present time, and upon the argument, hearing and decision of the above entitled cause in said Court, do hereby certify, that upon the hearing of the said cause, the appellant, Alfred Dozier (Defendant in the Court Below) relied upon for defense that in disposing of picture frames in the manner and under the circumstances shown by the record, that he was engaged in Interstate commerce, and that Section 17 of an Act of the Legislature of Alabama, approved March 7th, 1907, and entitled:

"An Act to further amend the Revenue laws of the State of Alabama,"

in so far as is sought to impose a license on him for so disposing of said frames was unconstitutional and void, said Act being in conflict with and contrary to Article 1 of Section 8 of the Constitution of the United States, and said Alfred Dozier further relied for defense that the said Act of the Legislature of Alabama aforesaid was unconstitutional and void by reason of discriminating against merchants and dealers having no permanent place of business within the State of Alabama, and thus being in violation of Article 14, Section 1 of the Constitution of the State of Alabama: that no other defense was interposed by the said Alfred Dozier; that said Alfred Dozier was convicted in the City Court of Montgomery for selling or disposing of picture frames, without taking out a license therefor, contrary to law, and on appeal by the said Alfred Dozier, to this Court, the judgment of conviction of said City Court of Montgomery was affirmed, this court deciding that the disposing of the frames, in the manner

and under the circumstances disclosed by the record did not constitute Interstate commerce, and further that said Section 17 of the Act of the Legislature, aforesaid, was not a discrimination against citizens of other states, and was not in conflict with or contrary to Article 14, Section 1 of the Constitution of the United States,

And I further certify that this, the said Supreme Court of Alabama in which final judgment was rendered against said appellant, Alfred Dozier, is the highest court in which a decision of said cause can be had in the State of Alabama.

Signed this the 28th day of February, 1908.

JNO. R. TYSON,
Chief Justice of the Supreme Court of Alabama.

Copy.

STATE OF ALABAMA,
Montgomery County:

Know all men by these presents, That we, Alfred Dozier, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the State of Alabama in the just and full sum of Five Hundred Dollars, for the payment of which well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents. Sealed with our seals and dated this the 28th day of February, 1908.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in above entitled cause by the Supreme Court of Alabama.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void otherwise to remain in full force and effect.

ALFRED DOZIER.
AMERICAN SURETY CO. OF NEW YORK,
By T. J. REYNOLDS,
Resident Vice-President.

Attest:

FRED S. BALL,
Resident Assistant Secretary.

22 In the Supreme Court of the United States of America.

ALFRED DOZIER, Plaintiff in Error,
vs.
STATE OF ALABAMA, Defendant in Error.

Writ of Error to the Supreme Court of Alabama.

Assignment of Errors.

And now comes the said Alfred Dozier, plaintiff in error, by A. D. Gash, his attorney, and says that in the record and proceedings, and in rendering judgment in said Supreme Court of the State of Alabama, there is manifest error in this, towit, the Court erred:

1. In holding that plaintiff in error was not engaged in interstate commerce.

2. In holding that Section 17 of an Act of the Legislature of the State of Alabama entitled, "An Act to further amend the revenue laws of the State of Alabama, approved March 7, 1907," was constitutional.

3. In holding that Section 17, aforesaid, is not in conflict with the Federal Constitution, in that it discriminates in favor of merchants having a permanent place of business, as against merchants residing without the State.

4. In affirming the judgment of the City Court of Montgomery, convicting plaintiff in error of a violation of Section 17, aforesaid, of the Laws of Alabama.

5. In not reversing the judgment of the City Court of Montgomery, convicting plaintiff in error of a violation of Section 17, aforesaid, of the Laws of Alabama.

By reason whereof plaintiff in error prays that said judgments of the Supreme Court of the State of Alabama, and the City Court of Montgomery, Alabama, may be reversed.

A. D. GASH,
HILL, HILL & WHITING,
Attorney- for Plaintiff in Error.

23 In the Supreme Court of the United States.

ALFRED DOZIER, Plaintiff in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Supreme Court of Alabama, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, being the highest court of law or equity in said State in which

a decision could be had in said suit between Alfred Dozier, appellant, and the State of Alabama, appellee, and wherein judgment was in favor of said appellee in said court on the 13th day of February, 1908, and against the said appellant, in which said cause, the said appellant, Alfred Dozier, relied for his defense: that in disposing of picture frames in the manner and under the circumstances shown by the record, he was engaged in Interstate commerce, and that Section 17 of an Act of the Legislature of Alabama, and entitled:

"An Act to further amend the Revenue laws of the State of Alabama."

for a violation of which he was being prosecuted by the said State of Alabama, was unconstitutional and void, in that said act was in conflict with and contrary to Article 1, Section 8 of the Constitution of the United States, and also in conflict with and contrary to Article 14, Section 1 of the Constitution of the United States, and whereby it is claimed the said decision or said judgment of the Supreme Court of Alabama rendered against the said Alfred Dozier on said 13th day of February, 1908, is contrary to and in conflict with Article 1, Section 8 and Article 14, Section 1 of the Constitution of the United States to the great damage of Alfred Dozier, as by his complaint appears, we being willing, that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties as aforesaid in this behalf, do command you if judgment herein be given, that then, under your seal distinctly and openly, you send the record and the proceedings aforesaid with all
24 things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same in Washington on the 28th day of March, 1908, in the said Supreme Court, to be then and there held, that the record of the proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court this the 28th day of February in the year of our Lord one thousand nine hundred and five.

Witness also my official signature and the seal of the United States Circuit Court for the Middle District of Alabama, this the day and year aforesaid.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the United States Circuit Court for the Middle District of Alabama.

Allowed by

JNO. R. TYSON,
Chief Justice, Supreme Court of Alabama.

25 Copy.

STATE OF ALABAMA,
Montgomery County:

Know all men by these presents, that we, Alfred Dozier, A. F. Whiting and Wiley C. Hill, are held and firmly bound unto the State of Alabama in the sum of $300.00, for the payment of which well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals, and dated the 28th day of February, 1908.

The condition of the above obligation is such, that whereas on the 13th day of February, 1908, the Supreme Court of the State of Alabama, affirmed a judgment of conviction of the said Alfred Dozier by the City Court of Montgomery, for the offense of selling or disposing of picture frames without a license; and whereas, the said Alfred Dozier has this day made application for a writ of error from said judgment of affirmance by said Supreme Court of Alabama to the Supreme Court of the United States.

Now if the said Alfred Dozier shall personally appear at the next term of said City Court of Montgomery and from term to term thereafter until discharged by law, to abide by and perform whatever sentence may be adjudged against him, then this obligation to be void, otherwise to remain in full force and effect.

ALFRED DOZIER.
A. F. WHITING,
WILEY C. HILL.

Taken and approved this 28th day of Feb'y, 1908.
JNO. R. TYSON,
Chief Justice.

26 In the Supreme Court of Alabama.

ALFRED DOZIER, Appellant,
vs.
STATE OF ALABAMA, Appellee.

Citation.

United States of America to State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Supreme Court of the State of Alabama, wherein Alfred Dozier is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John R. Tyson, Chief Justice of the Supreme Court of the State of Alabama, this the 28th day of February, 1908.

JNO. R. TYSON,
Chief Justice of the Supreme Court of Alabama.

We the undersigned, attorneys for the State of Alabama, defendant in error, in the said cause of Alfred Dozier, plaintiff in error, *versus* the State of Alabama, defendant in error, hereby accept due personal service of the foregoing citation on behalf of the said State of Alabama. This 29th day of February, 1908.

ALEX. M. GARBER,
Attorney General,
THOS. W. MARTIN,
Ass't Att'y Gen'l,
Attorneys for Defendant in Error.

27 STATE OF ALABAMA,
Montgomery County:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause duly certified and authenticated according to law to the Honorable Supreme Court of the United States.

In testimony whereof I have caused the seal of said Court to be hereunto affixed, in the City of Montgomery, County of Montgomery and State of Alabama, on this the 6th day of March, 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

28 UNITED STATES OF AMERICA,
State of Alabama, ss:

I, John R. Tyson, Chief Justice of the Supreme Court of Alabama, in the State of Alabama, hereby certify that Robert F. Ligon, who signed the above certificate was at the time of signing the same, and is now, Clerk of the said Supreme Court of Alabama, duly commissioned and qualified. That said Court is a Court of record, having a Clerk and Seal. That said attestation is in due form, and by the proper officer, according to the laws of the State of Alabama, and that the above signature of said Clerk is genuine.

Witness my hand and seal at Montgomery, Montgomery County, Alabama, this 12th day of March, A. D. 1908.

[Seal of the Supreme Court of Alabama.]

JNO. R. TYSON, [SEAL.]
Chief Justice of the Supreme Court of Alabama.

UNITED STATES OF AMERICA,
State of Alabama, ss:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, being a Court of record, do hereby certify that the Honorable John R. Tyson, whose name is subscribed to the annexed and foregoing certificate, was at the time of the signing thereof, and now is, one of the Judges and Chief Justice of said Supreme Court of Alabama, duly elected, commissioned and qualified, and that his signature is genuine.

In witness whereof I have signed my name and affixed the seal of said Supreme Court of Alabama, at my office in the City of Montgomery, in the County of Montgomery, State of Alabama, this 12th day of March, A. D. 1908.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 21,075. Alabama supreme court. Term No. 105. Alfred Dozier, plaintiff in error, *vs.* The State of Alabama. Filed March 19th, 1908. File No. 21,075.

FILED.
NOV 8 1909
JAMES H. McKENNE

NO. 105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

ALFRED DOZIER,
Plaintiff in Error.

vs.

THE STATE OF ALABAMA,
Defendant in Error.

In Error to the Supreme Court of Alabama.

Brief and Argument for Plaintiff in Error.

A. D. GASH,
Attorney for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

ALFRED DOZIER,
Plaintiff in Error.

vs.

THE STATE OF ALABAMA,
Defendant in Error.

In Error to the Supreme Court of Alabama.

Brief and Argument for Plaintiff in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

Section 17 of an act of the legislature of Alabama approved March 7, 1907, entitled "An Act to further amend the Revenue laws of the State of Alabama" reads as follows:

> "Section 17. That each person, firm or corporation, either in person, or, through agents who solicit orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not, or any person, firm or corporation either in person, or through agents who sells or disposes of picture frames, shall pay a license tax of twenty-five dollars in each county in which they do business; *that this act shall not apply to merchants or dealers having a permanent place of business in this state and keep-*

ing picture frames as a part or all of their stock in trade." Acts 1907, p. 455.

Plaintiff in error is an agent of Chicago Crayon Co., an Illinois corporation, which has no place of business nor stock of goods in Alabama. It is engaged in the business of making and enlarging pictures from photographs and in manufacturing picture frames in Chicago, Illinois. It has agents who solicit orders in the words (Rec., p. 5) following:

> "Post Office ..... Date ..... 190..
> I, the undersigned, hereby order from the Chicago Crayon Company one crayon portrait unframed, size .....x..... for which I agree to pay $..... when delivered. I also understand that my portrait is to be delivered in an appropriate frame which this contract entitles me to accept at factory price.
> Signed .....Customer."

Upon receiving such an order, it through its agent, executes the following contract (Rec., p. 5):

> "On or about ..... 190.. we agree to deliver to ..... the holder of this contract, a finely finished crayon portrait, unframed, as shown by our salesman. The purchaser agrees to pay $..... for the portrait when delivered. All portraits are delivered in appropriate frames, which this contract entitles the purchaser to accept at factory prices. Elegant patterns that retail from $4.00 to $8.00 we furnish from $1.50 to $5.90 which is one third to one-half the usual prices.
> Kindly remember the date of delivery and have money ready as our deliveryman can make but one call to collect charges for same. Please be at home or leave the money with the nearest neighbor.
> Signed.....,
> Advertising Salesman Chicago Crayon Co."

A duplicate of this contract is sent to the company in Chicago. When the portrait is ready for delivery a notice is sent to the purchaser and the portrait and frame are shipped from Chicago to the place where they are to be delivered consigned to the company and are received and receipted for by the agent of the company.

Plaintiff in error was engaged in delivering pictures and frames and collecting therefor in the manner above stated when he was arrested for the violation of section 17 above set out.

He was tried on the foregoing agreed statement of facts, found guilty and a fine and costs of $120 were assessed against him. He appealed to the Supreme Court of Alabama, where he contended that he was engaged in interstate commerce and that said section 17 was void because it sought to restrain, restrict, interfere with, tax and regulate interstate commerce in contravention of the clause of the Federal Constitution which provides that Congress shall have power to regulate commerce among the several states; and that said section 17 was void because repugnant to section 1 of article XIV. of the Federal Constitution which provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

The State Supreme Court affirmed the judgment.

Section 17 aforesaid discriminates against the rights and privileges of citizens of the other states, is unconstitutional and void, being repugnant to Art XIV., section 1 of the Constitution of the United States.

An agent of a foreign corporation who delivers a frame to each purchaser of portraits whose contract of purchase provides that the portrait will be delivered in a suitable frame that may be accepted at factory price, who has only one frame fitted to and surrounding each portrait as it is delivered and who does not offer to sell any frame to others than those whose contract calls for the option of accepting said suitable frame and who carries no extra frames whatever, but keeps the title for his company or returns to his company any frame that is refused is engaged solely in interstate commerce.

Chicago Portrait Co. v. *Mayor of Macon*, 147 Fed. Rep., 967.

State v. *Coop*, 41 L. R. A., 501.

City of Laurens v. *Elmore*, 55 S. C., 477.

An order in which the purchaser agrees that the portrait is to be delivered in an appropriate frame and a contract by the seller to deliver it in an appropriate frame and the frame having been manufactured in another state after the order was given and being especially made for, appropriate for and fitted to the portrait in question and the price having been agreed upon between the purchaser and maker as the factory price, make the negotiations and transactions interstate commerce. The mere fact that the purchaser may refuse to accept the frame because it

is inappropriate or for any other reason does not deprive the transaction of its qualities of interstate commerce.

ARGUMENT.

The case of *State* v. *Montgomery*, 43 Atl. Rep. (Me.), 13, cited by the Supreme Court of Alabama in the opinion in the case at bar is not in point because in that case there were contracts for sixty portraits to be made and only twenty-seven frames were sent to the agent and the portraits were by him put in some of the twenty-seven frames and delivered, whereas in the case at bar each frame was especially selected to be sent and be appropriate for the particular portrait after it was made and it was determined by the company what sized moulding should be used to make the particular portrait look the best and the frame was made up and fitted to the particular portrait and delivered and the portrait and frame were so intimately connected, suited to and appropriate to each other that both together really constituted a unit or single thing.

The case of *Chrystal* v. *Mayor*, 33 S. E. Rep. (Ga.), 810, is not in point because there the facts set out in the opinion showed that the person who received a portrait made to order if he desired a frame "selected it from a 'stock' of frames which had already been shipped from Illinois into Georgia." The court in the case at bar in citing that case from the Georgia court in the opinion say:

> "It was argued that a portrait and its frame were so intimately connected that both together really constituted a unit or single thing. This may be quite true after a portrait is placed in a frame; but manifestly, until this has been done they are separate and distinct things."

This statement by that court shows that it would have decided on the facts in the case at bar where the portrait was made to order in Chicago, a suitable frame or moulding made up into a suitable frame, the portrait then encased therein and shipped to Alabama and there delivered as a unit to the person who ordered the portrait, that such a portrait and frame were a unit and that the business was interstate commerce.

Neither the Maine nor the Georgia case cited in the opinion herein are cases of discrimination against goods manufactured in other states as is the case herein. Even the Supreme Court of Maine holds that where a statute discriminates against goods manufactured in other states as is the case in the suit at bar, it is obnoxious to the Federal Constitution and void.

State v. *Farbish*, 72 Maine, 493.

In the case of *State* v. *Coop*, 41 L. R. S. (S. C.), 501, the court found that portraits and frames sold in a somewhat similar manner were interstate commerce and that such sales were not to be licensed or taxed. That is a much stronger case in favor of the taxing ordinance than the one at bar. In that case the notice sent to the person who ordered the portrait said the "delivery man will show you a fine *selection* of frames and if you desire you can

purchase one at wholesale prices," while in the case at bar the purchaser of the portrait cannot have any *selection* of frames, but he has contracted to have it delivered in an appropriate frame "which this contract entitled the purchaser to accept at factory prices." Then follows a range of factory prices from $1.50 to $5.90 which does not mean that he may select any one of those various priced frames, but that the company in making an appropriate frame suitable to the portrait has selected moulding, made into the frame attached to and encasing the portrait priced at factory prices ranging from $1.50 to $5.90, according to the grade width, and depth of the moulding and size of portrait. It means that the company will select and make up a frame suitable to the portrait, that the company shall be the first judge as to its suitableness, that the price shall be between $1.50 and $5.90, according to the grade and width of moulding used, that the company is under the obligation of the contract to make and deliver its selection as made and the purchaser can refuse it if he does not like the selection or quality. The portrait purchaser can under his contract demand that as a part of the consideration of the price of the portrait the company shall select the moulding, make up and deliver a suitable frame, which will suit the portrait to be delivered at the home of the purchaser. He can as a part of the price of the portrait compel the company to carry, or haul the frame so selected and made up, clear to the purchaser's door whether he lives in town or country. The company has contracted so to do. The company has contracted to furnish the frame at

factory prices. Factory prices are definite and certain; nothing uncertain about them can be proven. Then a range of these prices is agreed upon. The price according to the smallest sized portrait or largest sized portrait ordered is limited both minimum and maximum. The purchaser before he pays the purchase price of the portrait can demand that the company carry out its agreement to furnish and deliver the portrait in a suitable frame at factory price If the company does not do this the purchaser can refuse to pay for the portrait. It is a breach of the contract if the portrait is not delivered in a suitable frame. No suit at law could compel him to pay for the portrait if the company did not frame the portrait and bring it to him in a frame already for hanging so that he would have nothing further to do to have a complete portrait suitable for hanging. The natural purpose of portraits being ordered is that they may be hung on walls for display. The portrait without a frame cannot be hung for display. The frame makes it a finished article and sets off the beauty of the portrait. A frame is a natural part of the portrait. It is not complete without a frame. It cannot be displayed to any advantage without being in a frame. The portrait and frame make a unit. Neither is complete without the other. A frame that would fit one picture would not fit another except they are exactly the same size. But that is not the chief difficulty of selection. That is only as to the manual work of making the frame. A wide, flat moulding might give the desired effect to a full figure portrait whereas a wide, deep frame might give the best

effect to a bust portrait and some other kind of frame, a narrow natural wood frame, for instance, might give the best effect to a head and shoulder portrait, while a wide, deep gilt frame would be an absolutely necessity to an oil portrait. All this work or skill of selection the purchaser of each portrait commands by paying the purchase price of the portrait. True it is that the purchaser if he does not like the selection can refuse to take it at the factory price and he cannot be compelled to pay. True, also it is, that he can just as easily for any reason refuse to take the portrait and he will not be compelled to pay for it. Theoretically he could be sued for the price agreed, but on account of such small sums involved and the non-residence of all witnesses he is just as immune from the price of the portrait as he is from the price of the frame.

The case of *State* v. *Coop*, 52 S. C., 508, is a picture and picture frame case, and is in point with the case at bar. In that case the court say:

> "The portraits and frames are shipped to the agent at the same time, and the portraits are delivered in frames, which the party is not compelled to purchase, but may do so if he sees fit. A portrait is not complete without a frame, and the frame may be properly regarded as a part of or incidental to the picture. If the person to whom the portrait was delivered did not purchase the frame in which it was then placed, he would very likely purchase a frame elsewhere. It does not appear that the agent sells the frame to any except those who had given orders for the portraits, nor that he goes to any place to sell the frames except where he is required to go to deliver the portraits. The person ordering the portrait knows then that

it will be delivered in a frame, and that he will have an opportunity of purchasing it at that time. The tendency of these negotiations is to lead to a sale of the frame at the wholesale price, when the portrait is delivered. This case does not fall either within the letter or the spirit of the statute against hawkers and peddlers, and even if the statute could be construed as intending to embrace a case like this, it would be unconstitutional on the ground of interference with interstate commerce."

The Supreme Court of South Carolina in *Laurens* v. *Elmore,* 55 S. C., 477, a picture frame case, say:

"This is an appeal from the judgment of the Circuit Court which reversed the judgment of the mayor's court of the City of Laurens, wherein the defendant was adjudged guilty of the violation of an ordinance of such city, fixing a special license tax for all occupations carried on within said city of Laurens, S. C. It seems that The Chicago Portrait Company of Chicago, in the State of Illinois, is engaged in the business of enlarging pictures or photographs, and selling frames to such pictures. This company carries on this work through agents, who deliver such work when completed under a contract previously made between the customer and said company. To purchase the frame is entirely voluntary, but the company only sends frames to its customers in contracts for enlarging pictures or photographs. Of course, it is lawful for the City of Laurens to exact a license from persons doing business within the limits of the city, unless the same contravenes the laws of the United States.

"The Circuit judge held that the proposed special license was in contravention of the clause of the United States constitution, which confides to congress the power to regulate interstate commerce. This court, in the recent case

of the *State* v. *Coop,* 52 S. C., 508, held that one who delivers a portrait already sold in a frame, with option to purchaser to buy a frame as set out in the contract of sale of the portrait, is not a hawker and peddler, under Crim. Code, 294, in selling the frame to the purchaser of the portrait. This decision was bottomed upon the two prior cases of the *State* v. *Moorehead,* 42 S. C., 211, and *Alexander* v. *Greenville Co.,* 49 S. C., 527, and all three cases are decided in view of Art. 1, Sec. 8, of the United States constitution. If congress has had confided to it, under the terms of the Federal constitution, the duty of regulating commerce between the states, its jurisdiction is exclusive, and the states can only exercise any interference with such commerce by special power given therefor by congress. No power has been confided by congress to the states of this Union except in a few cases, and the present instance is not one of them. Hence the ordinance of the city council of Laurens, now in question, is unlawful. And therefore, the Circuit judge committed no error in the ruling appealed from. *Brennan* v. *Titusville,* 153 U. S., 289.

"It is the judgment of this court that the judgment of the Circuit Court be affirmed."

In the case of *Chicago Portrait Co.* v. *Mayor,* which is another picture frame case very similar to the case at bar, the United States District Judge SPEAR in 147 Fed. Rep., 967, says:

"I think that the nonresident manufacturer of these pictures has the right to send its soliciting agents here and attempt to market its wares, and it also has the right to send its other agents here and deliver the wares when sold, and collect the price thereof, and the entire transaction being exclusively commerce between the states, and being in no sense objectionable as inimical to the good order and safety

of the community neither the state nor the city has any right to impose or collect taxation therefor.

"It is said, however, that the sale of the picture frames by delivering agents will make them peddlers. It is not discoverable from the evidence submitted that the delivering agents sell the frames. The language is: 'Each and every customer had the privilege of receiving his picture framed or unframed, and take his choice between frames of different prices.' But, if this can properly be construed to indicate that the delivering agent is engaged in selling the frames, there is, nevertheless, high authority to negative this theory of the defendant. The Supreme Court of South Carolina, in the case of *State* v. *Coop*, 30 S. E., 609, 41 L. R. A., 501, Mr. Justice GARY delivering the opinion, held that the sale of the frame is a mere incident to the business in which appellant was regularly engaged, and the frame may properly be regarded as part of or incident to the picture. 'This case,' the learned justice remarks, 'does not fall within the letter or spirit of the statute against hawkers and peddlers, and, even, if the statute could be construed to embrace cases like this, it would be unconstitutional on the ground of interference with interstate commerce.'"

The opinion of this court in *Caldwell* v. *North Carolina*, 187 U. S., 622, is such good argument in favor of plaintiff in error's contention, is written in a case with almost identical facts and gives such a good review of all the other decisions in similar cases that we quote it at length, as follows:

"At the June term, 1900, of the Superior Court of Guilford county, State of North Carolina, E. M. Caldwell was tried before a court and jury for an alleged offense in having en-

gaged in the business of delivering pictures without having first obtained a license so to do. The jury found a special verdict as follows:

"'The business mentioned in the ordinance following is not named in the character of the city, other than in the above section.

"'That the following is an ordinance duly passed by the board of aldermen of the City of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

"'"Be it ordained by the board of aldermen of the City of Greensboro, North Carolina:

"'"That every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the City of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year.

"'"Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense."

"'That neither the defendant, The Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company, have paid the city any license tax.

"'If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

"'That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for

which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

"'That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods House, a hotel in the City of Greensboro, and there broke the bulk, *placing said pictures in their proper frames,* and from this point delivered the portraits one at a time to the purchasers in the City of Greensboro;

"'The defendant had been engaged in this work two days when arrested;

"'That section 57 of the charter of the City of Greensboro, N. C., is as follows:

"'"That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which taxes when fixed, shall be collected by the collector of taxes, and if it is not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner, may be forthwith distrained and sold to satisfy the same, namely:

"'"21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a license tax on any business carried on in the City of Greensboro, not before enumerated herein, not to exceed ten dollars a year."'

"Upon this special verdict the court adjudged that defendant was guilty, and sentenced him to pay a fine of $20.00 and costs for the

action. From this judgment the defendant appealed to the Supreme Court of North Carolina. The court, Faircloth, C. J., and Clark, J., dissenting, on February 19, 1901, affirmed the judgment of the Superior Court; and thereupon the case was brought to this court by a writ of error allowed by the chief justice of the Supreme Court of North Carolina.

"Mr. Charles M. Stedman for plaintiff in error, Mr. W. R. Plum was with him on the brief. Mr. Alfred M. Scales for defendant in error.

"Mr. Justice Shiras after making the foregoing statement, delivered the opinion of the court.

"It might be fairly contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the Supreme Court of North Carolina has held otherwise, we must except that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed, is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for we think the case falls within previous decisions of this court on this subject.

"Such decisions are numerous, but we do not deem it necessary to refer to but a few of them.

"The subject was elaborately considered in '*Robbins* v. *Shelby Taxing District*,' 120 U. S., 489. The case was brought here on a writ of error to the Supreme Court of Tennessee, which had held valid a statute of that state, by which it was enacted that 'all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week or $25

per month for such privilege, and no license shall be issued for a longer perior than three months.' Robbins, the plaintiff in error, was a citizen and resident of the City of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati without having procured a license. In his discussion of the case Mr. Justice BRADLEY stated the following principles, as already established by this court: The Constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health and comfort of persons and the protection of property, and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and imposes taxes upon all property within the state, mingled with and forming a part of the great mass of property therein; but that, in making such internal regulations, a state cannot impose taxes upon persons passing through

the state, or coming into it merely for a temporary purpose, especially if connected with interestate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce.

"Upon these established principles the conclusion was reached that the state statute in question was invalid, and the following observations are pertinent to the question before us:

"'It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples, whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true, but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such undoubtedly was one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that

it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the constitution, and which was one of the principal causes which led to it. If the selling of goods by samples and the employment of drummers, for that purpose injuriously affect the local interests of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation.'

"*Asher* v. *Texas*, 128 U. S., 129, was a case where a state statute required from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax,' and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another state. The same doctrine was held in *Stoutenberg* v. *Hennick*, 129 U. S., 141, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an act of the legislative assembly of the District of Columbia.

"In *Lyng* v. *Michigan*, 135 U. S., 161, the general proposition was repeated.

"'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of du-

ties laid on the transportation of the subjects of the commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress.'

"In *Crutcher* v. *Kentucky*, 141 U. S., 47, an act of the State of Kentucky, which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the state, was held to be a regulation of commerce and invalid. Mr. Justice BRADLEY, speaking for the court, said:

" 'The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are to that extent unconstitutional and void.'

"In *Brennan* v. *Titusville*, 153 U. S., 289, was again presented the question of the validity of an ordinance providing 'That all persons canvassing or soliciting, within the City of Titusville, orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the treasurer therefor certain sums,

statute by the state court, reversed the judgment of that court in respect to the nature of the commerce as interstate. In the opinion of the court, delivered by Mr. Justice PECKHAM, the principal cases, beginning with *Brown* v. *Maryland*, 12 Wheat., 419, and ending with *Brennan* v. *Titusville*, were again reviewed, and the conclusions there reached were affirmed.

"The State Supreme Sourt endeavored to distinguish the present case from that of *Brennan* v. *Titusville*, in the following observations:

" 'The defendant insists that *Brennan* v. *Titusville* is directly in point— is, in every essential fact, this case—and should control the opinion of the court on this appeal. And it is in many respects like this case; but there is one material difference between that case and this which marks the distinction. In that case the goods were shipped directly to the purchaser. In this case they were shipped by the Chicago company to itself in the City of Greensboro; and when they reached Greensboro, the defendant, as the agent of the Chicago company, received them from the railroad at its depot, carried them to its rooms in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together and delivered them to the purchasers in the City of Greensboro and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of *Brennan* v. *Titusville*, and we should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. If they had been completed in Chicago,

and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago—the railroad being deemed to be the agent of the consignee, and *Brennan* v. *Titusville* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to themselves, "The Chicago Portrait Company," in Greensboro. This being so no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing of these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable. It seems to us that it could not.'

"We are not persuaded by this reasoning. It seems to proceed from two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro.

"But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the state. It

is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

"But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplette when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and 'placing the pictures in their proper places' (the language of the verdict), meant that each picture was placed in the frame designed for it. *The selection of the frame was as much a part of the purchase and sale as the selection of the picture.*

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

"Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from

state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the constitution.

"It cannot escape observation that efforts to control commerce of this kind, in the interest of the states where the purchasers reside, have been frequently made in the form of statute and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation.

"Upon principle and authority, therefore, we conclude that the judgment of the Supreme Court of North Carolina should be and is reversed, *and the cause is remanded to that court to take further proceedings not inconsistent with this opinion.*"

Plaintiff in error submits that he was at the time of his arrest engaged in interstate commerce; that section 17 of the act of the Alabama legislature approved March 7, 1907, is unconstitutional and that it discriminates against non-resident merchants and that the judgment of the Supreme Court of Alabama should be reversed without remanding the cause.

Respectfully,

A. D. GASH,
Attorney for Plaintiff in Error.

NO. 105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1908

ALFRED DOZIER,
Plaintiff in Error,

vs.

STATE OF ALABAMA,
Defendant in Error.

} In Error to the Supreme Court of Alabama.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

A. D. GASKIN,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

ALFRED DOZIER,
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In Error to the Supreme Court of Alabama.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

Counsel for defendant in error are mistaken when they say on page 3 of their brief that the "company agreed to deliver the picture, *unframed.*" That is a mistake. The contract shows that the company agreed to deliver the picture *in a frame* (Rec., p. 5). It is as much a part of the contract that the picture shall be placed in a frame as is any other part of the contract.

So that in the case of *Crystal* v. *Mayor* (Ga.), cited by defendant in error, the facts are not like those in the case at bar, because in that case it was argued that "a portrait and its frame were so intimately connected that both constituted a unit or single thing," and the court passed upon that argument by

saying: "This may be quite true after a portrait is placed in a frame." So that the court in that case would have held with the view and contention of plaintiff in error here, had the picture or portrait in that case been contracted to be delivered in a frame as it was in the case at bar.

Again, it may be added that it was as much the duty of the company to deliver the picture framed in an appropriate frame under the contract as it was to have delivered it at all, and surely no one will contend but that the company was under obligations to deliver the picture.

Defendant in error contends that the contract does not provide that the frame was to be manufactured in another state; nor that it was to be made especially for the particular order. But it is a part of the stipulated facts that the company's *factory* is in Chicago, and not in Alabama, and the contract speaks of frames at *factory* prices. The contract also has appropriate blanks for the size of the picture which the customer desires to order, which could be any size that might suit his fancy. Hence, a frame would necessarily have to be made to fit the size ordered. The agreed statement of facts nowhere intimates that the frame is to be made, selected, or fitted in the State of Alabama, but everything contemplates that it was to be done outside of the State of Alabama.

Counsel for defendant in error complain that no authorities were cited in support of the contention that the statute in question Sec. 17 of the Alabama Act violates Sec. I of the 14th amendment to the Con-

stitution, in that it discriminates against the right and privileges of citizens of other states. We thought that this statement was self-evident, that the Constitution was authority enough, but if counsel desire other authorities we would cite them to

Welton v. *Missouri,* 91 U. S., 275.
Walling v. *Michigan,* 116 U. S., 446.
Webber v. *Virginia,* 103 U. S., 344.

All of which cases are exactly in point with the case at bar and establish beyond peradventure that Sec. 17 of the Act of Alabama, is unconstitutional, in that it discriminates against the rights and privileges of citizens of other states.

A comparison of the statutes in the case of *Emert* v. *Missouri,* and *American Steel & Iron Co.* v. *Speed,* relied upon by defendant in error will show the cases and the decisions therein not to be analogous with the case at bar in any regard.

The case of *Emert* v. *Missouri,* 156 U. S., 296, is a case of a peddler going through the country with a buggy and horse, and taking orders for Singer Sewing Machines, but they caught him selling the machine that he had on the wagon.

The statute in question therein is as follows:

> "The statute of Missouri, under which the conviction was had, is contained in a separate chapter of the Revised Statutes of the State, entitled 'Peddlers and their licenses' and relating to no other subject. By this statute, 'whoever shall deal in the selling of' any goods, wares, or merchandise (except books, charts, maps and stationery), 'by going from place to place to sell the same, is declared to be a peddler'; and is prohibited from selling as a peddler without a

license (Rev. Stat. of 1879, 6471, 6472). The license is required to state how the dealing is to be carried on, whether on foot, or with one or more beasts of burden, a cart or wagon, or a boat or vessel; and may be obtained by any person paying the tax prescribed, according to the manner in which the business is carried on (Sec. 6473, 6477). Any person dealing as a peddler, without a license, whether with a pack, a wagon, or a boat, is to pay a certain penalty, which, in the case of peddling in a cart or wagon, is fifty dollars (Sec. 6478). And any peddler who refuses to exhibit his license, on demand of a sheriff, collector, constable, or citizen householder of the county, is to forfeit the sum of ten dollars (Sec. 6479)."

The statute involved in the case of *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500, is as follows:

"Section 28, Art. II., of the constitution of the State of Tennessee, so far as pertinent to the issue to be decided, is as follows:

"'All property, real, personal or mixed, shall be taxed. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the state, shall not be taxed at a rate higher than the *ad valorem* tax on property.'

"Section 30, article II., of the same constitution provides:

"'No article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees.'

"The assessing and taxing laws of the State of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general *ad valorem* tax upon all property; second, for a merchants' tax separate from the general *ad valorem* levy, this latter tax being of two classes: A tax upon the average capital invested in business and a privilege tax, which was at a different rate and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the State of Tennessee concerning the merchants' tax contained the following:

"The term 'mechants' as used in this act, includes all persons, co-partnerships or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this state, and confectioners, whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered."

From a reading of the foregoing statutes involved in those two cases, it is evident that the decisions therein cannot control the decision in the case at bar. Section 17 of the Alabama Act is obnoxious to article 1, section 8 of the constitution of the United States and also to article 14, section 1 of said constitution, and the judgment in the Supreme Court of Alabama should be reversed.

Respectfully submitted,

A. D. Gash,

Attorney for Plaintiff in Error.

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No. 105.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

ALFRED DOZIER, PLAINTIFF IN ERROR,
vs.
THE STATE OF ALABAMA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

BROWN PRINTING CO., MONTGOMERY, ALA.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

ALFRED DOZIER, PLAINTIFF IN ERROR,
vs.
THE STATE OF ALABAMA, DEFENDANT IN ERROR.
IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

The plaintiff in error was arrested on an affidavit charging him with engaging in or carrying on the business of soliciting orders for the enlargement of photographs or of selling or disposing of picture frames without a license and contrary to law. He was tried and convicted in the county court from whence he appealed to the City Court of Montgomery, and he was here again convicted and he then apppealed to the Supreme Court of Alabama where the judgment of conviction was affirmed and this writ of error was sued out to reverse the judgment of conviction.

The prosecution was begun under section 17 of the Act of the Legislature of Alabama, approved March 7, 1907 (Gen. Acts 1907, p. 469), as follows:

"That each person, firm or corporation, either in person or through agents, who solicits orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they make charge for such frames or not; or any person, firm or corporation either in person or through agents who sells or disposes of picture frames shall pay a license tax of twenty-five dollars in each county in which they may do business; but this Act shall not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade."

This Act has since been codified into and now constitutes subdivision 7 A, of section 2361 of the Political Code of Alabama, of 1907.

The cause was tried on an agreed statement of facts from which it appears that at the time the prosecution was begun the defendant was an agent of the Chicago Crayon Company, for the purpose of delivering pictures and frames and collecting the money therefor, the orders for which pictures and frames had previously been taken by other agents of the company; that the company was a corporation of the State of Illinois, and doing business in that State and was engaged in the business at Chicago of making and enlarging portraits and manufacturing frames; and in the prosecution of its business the company had agents traveling in the State of Alabama who solicited orders and the bill of exceptions recites that *such orders were the same as the one attached thereto and marked Exhibit "A" and made a part thereof and were signed by the customer and witnessed by the agent. Upon securing this order the agreement marked Exhibit "B" attached thereto and made a part of the bill was signed by the agent and turned over to the party giving the order and a* duplicate was forwarded to the Company at Chicago; and when the portrait ordered was ready for delivery, a notice was sent to the person who ordered the same and the portrait and

frames were shipped from Chicago to the place where they were to be delivered, consigned to the Company, and that all orders were taken, executed, shipped and delivered in the name of the company, and that the picture frames remained the property of the company until delivered and collected for; and that the defendant since March 7th, 1907, in the County of Montgomery had been engaged in the business of delivering picture frames and collecting therefor as above stated; and that neither the defendant nor the company had a permanent place of business within the State as mentioned in the proviso of section 17 of said act of March 7, 1907, and that the license tax had not been paid.

It appears from Exhibits "A" and "B" attached to the bill of exceptions that the customer was required to order an unframed picture and the company agreed to deliver the picture, unframed. Reference is made in both of the exhibits to the fact that the picture would be delivered in an appropriate frame and that the contract entitled the customer to purchase such frame at the factory price.

We concede that the defendant cannot be convicted for soliciting orders for the enlargement of *pictures* because the taking of the orders therefor and the delivery thereof in pursuance of the order-contract, constituted interstate commerce. But we do insist, and the Supreme Court of Alabama so held, that the sale of the frames was made and completed in Alabama by the agent, after the frames were brought into the State, and while in the possession of the agent and therefore, that the transaction with respect to the frames was not interstate but *intra state* commerce, and that the conviction should be sustained under the latter alternative in the complaint. The question has not been decided by this court. Our contention is supported by the following cases:

State v. Montgomery, 52 Maine 433; 43 Atlantic 13;
Chrystal v. Mayor, etc., 33 S. E. 810.

And see, also,

Machine Company v. Gage, 100 U. S. 676;
Emert v. Mo., 156 U. S. 296;
American Steel & Wire Co. v. Speed, 192 U. S. 500;
Rearick v. Commonwealth of Pa., 203 U. S. 506;
General Oil Co. v. Crane, 209 U. S. 231.

In State v. Montgomery, 52 Maine, 233 supra, the defendant was charged with going about from place to place and carrying for sale and exposing for sale pictures and picture frames. It appeared that the defendant was an employe of the Chicago Portrait Company and the order for the portrait was very much the same as in the case at bar, and contained the statement, "that the picture will be delivered in an appropriate frame, which the customer is advised, but not compelled to buy." At the time of the delivery, the defendant offered frames for sale to those persons who had ordered pictures. The Court said: "We think the case of the defendant was sufficient to constitute the crime of peddling picture frames without a license. He went from place to place in Farmington. He carried these picture frames. He exposed them for sale. * * * The fact that the frames were appropriate for the pictures, which had been ordered or that when the pictures had been delivered, they were encased in the frames, can make no difference. It is the same as if they were exposed separately or at another time. The frames had not been previously ordered. *The customers had made no previous contracts to purchase frames nor had the defendant's employer made any previous contract to sell picture frames. The selling or exposing for sale of picture frames was not incidental to the business of enlarging pictures, but was additional to it.* The defendant had the frames in his possession to expose for sale and then to sell if he could."

In Chrystal v. Mayor (Georgia), 33 S. E. 810, the Supreme Court of Georgia, in an opinion by Lumpkin, P. J., held that the agent of the portrait company was liable to

pay a tax for selling the frames under facts identical with those in the case at bar. The court said: "We have without serious difficulty reached the conclusion that in so far as the business in question related to the sale and delivery of the picture frames, it was certainly outside the scope and operation of the above mentioned clause of the Constitution of the United States. No customer of the portrait company agreed to purchase or was bound to take and pay for a picture frame unless he choose to do so after inspecting the portrait which he had ordered * * * The mere fact that at the time of ordering the picture, the customer may have reserved the right to select and buy a picture frame is of no consequence whatever * * * In no view of the matter could it be fairly said that a binding contract of any description relative to the purchasing of a picture frame existed between the company and any purchaser until a sale, negotiated in this State, was actually effected here. It was argued that a portrait and its frame were so intimately connected that both really constituted a unit or single thing. This may be quite true, after a portrait is placed in a frame; *but manifestly until this has been done, they are separate and distinct, each having its own independent commercial value, and the scheme of the very business under discussion distinctly recognizes that this is so.*"

An excellent discussion of this question will be found in the dissenting opinions of Judge Jones in State v. Coop, 52 S. C. 908; 41 L. R. A. 501 and in Laurense v. Elmore, 55 S. C. 477. The court in the main opinion in those cases held against our contention but the dissenting opinions are supported, it seems to us, by the better reason and authority. The main opinions in the two South Carolina cases, if of any value to plaintiff in error, are materially weakened by the dissenting opinions of Judge Jones.

On page 6 of the brief of plaintiff in error the following statement is made: "An order in which the purchaser agrees that the portrait is to be delivered in an appropriate frame, and a contract by the seller to deliver it in an

appropriate frame, and the frame having been manufactured in another state after the order was given and being especially made for, appropriate for, and fitted to the portrait in question, and the price having been agreed upon between the purchaser and maker as the factory price, make the negotiations and transactions interstate commerce. The fact that the purchaser may refuse to accept the frame because it is inappropriate or for any other reason does not deprive the transaction of its qualities of interstate commerce." This excerpt is not supported by the record. There was no "agreement" by the purchaser that the portrait should be delivered in an appropriate frame, nor a contract by the seller to so deliver it; but merely the expression in the customer's contract that he "understands" that the portrait "is to be" so delivered and practically the same reference to the frame in the contract of the company. Nor is there anything in Exhibit "A" or Exhibit "B" to indicate that the frame was manufactured in another State after the order was given, nor that the frame was made especially for the particular order; and we are utterly unable to see how counsel can, from the evidence, find any agreement between the parties relative to prices. There is a reference made to factory prices ranging from a smaller to a larger sum but certainly no *agreement* is thus laid on the purchaser to take one at the larger or the smaller price. If delivery should be made in a frame at a larger price it may be that the purchaser would prefer a cheaper frame and *vice versa*. Certainly there is nothing in the record which in the remotest degree places any obligation either on the seller to deliver the portrait in a frame or on the purchaser to accept the frame in which the delivery is made. The purchaser did not assume any obligation to take a frame and, therefore, the contract was complete upon the delivery of the portrait.

The effort of opposing counsel to distinguish the cases of State v. Montgomery and Chrystal v. Mayor, from the facts of this case, overlooks the main point of the contract

here involved. In the first case cited counsel state that some of the portraits were placed by the agent in frames sent him by the company, and in the Chrystal case that the selection was made by the purchaser from a stock of frames shipped from Illinois into Georgia. These particular features are immaterial. The purchaser did not order a frame in the present case nor in the cases cited. He had the right to reject or accept the frame in either of the cases. The fact that his selection in the case at bar was limited to the frame offered, and in the other cases that he was given the right to chose one of many frames is an incident, which can in no wise change the nature of the transaction from interstate to intra state commerce; and as showing that the courts do not regard this point as of any merit, we need only refer to the case of State v. Coop, supra, in which the court considered a contract which stated that the deliveryman would show a fine collection of frames from which the customer could purchase one at wholesale prices. The court there held that a portrait was not complete without a frame and that the frame might be properly regarded as a part of or incidental to the picture, and the case was tried upon the point that it did not fall either within the letter or the spirit of the statute against hawkers and peddlers, and it seems that the subsequent case of Laurens v. Elmore, 55 S. C. 477 was disposed of on the same point.

In the other case cited by counsel, Chicago Portrait Co. v. Mayer, 147 Fed. 967, the District Judge undertook to enjoin the City of Macon from enforcing a license tax on agents of the portrait company. The prayer of the bill was for an injunction to restrain and enjoin the City of Macon from arresting the agents of complainant who might be sent to Macon for the purpose of soliciting orders for pictures to be enlarged or who might be there for the purpose of delivering and collecting such pictures after they had been enlarged and returned for delivery. The Judge held that the agents who delivered the portraits after they were enlarged were not peddlers or hawkers, and

that they were engaged in interstate commerce. The last paragraph of the opinion refers to the sale of picture frames, and the Judge stated in substance *that it did not appear from the evidence that the delivering agents sold the frames,* and he did not hold that the agent could not be guilty of an offense on this theory, and merely referred to the case of State v. Coop, supra, and quoted that part of the opinion which held that "the sale of the frame was an incident to the business in which the company was engaged."

This review of the cases shows no direct and pointed holding against our contention by any court of last resort.

Stripped of all its technicalities, the transaction in this case resolves itself into a shipment of the picture frames by the manufacturer to its agent in another State there to be sold without any order from any person for such frames. In the cases of Machine Company v. Gage, 100 U. S. 676, and Emert v. Missouri, 156 U. S. 296, cases of this kind were considered, and this court held the agents liable in each case for the payment of the license tax. Those cases we submit determine the present case.

Several recent decisions of this court on the question of when the taxing power of the State begins, throw much light on this question. In American Steel & Iron Co. v. Speed, 192 U. S. 500, it appeared that a non-resident manufacturing corporation selected Memphis, Tenn., as a distributing point and selected a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse and make delivery in the *original packages* to the customers of the manufacturer either as expressly directed by it or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company. This court held that when the goods were stored in the warehouse they were no longer in transit, but had reached their destination and were held in the State for sale and were subject to taxation. It further appeared that salesmen of the Steel Company canvassed the territory of sev-

eral states adjacent to Tennessee and secured orders for nails and wire. The contract of sale did not specify the grade and quantity of the goods desired, which points were left open to be specified when the customer desired a delivery. When he desired to make his selection he notified the Steel Company and the goods were delivered, of the quality and of the class specified by him, and at prices named, in the contract. Thus it appears that the customer had the privilege of specifying during the life of the contract the kind of wire, nails or staples he desired delivered to him. These contracts were usually made before the goods arrived in Memphis, their point of destination; and generally the contracts were made in advance of the production of the goods at the factory. Large quantities of goods were then forwarded by rail or by water to the Patterson Transfer Co., at Memphis, where they were stored, and were reshipped to customers from time to time as and when they specified the character of goods desired. In addition to forwarding the goods out of Memphis in this manner it appeared that Memphis jobbers were permitted to make out their specifications, handing the same to the Patterson Transfer Company and the latter company delivered the goods specified in the order from the stock of goods on hand.

After reviewing the facts in detail Mr. Justice White said: "With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination in Memphis and were there held in store at the risk of the Steel Company to be sold and delivered after contracts for that purpose *were completely consummated.* All question therefore, as to the power of the State to levy the merchants' tax, based on the contrary contention, being without merit, may be put out of view." We have quoted at length from the facts of this case because of the close analogy they bear to those of the case at bar. But those facts present a much stronger case of interstate commerce than in the present case. It appeared that orders

were taken for the goods, the customer later had the right to specify during the life of the contract the kind of goods desired. And after the orders were taken and forwarded to the factory the goods were manufactured in sufficient quality to fill all of the orders which had been accumulated. The entire system of dealing in the two cases is much the same. If the American Steel Company and Wire Company was liable for the merchants' tax under the facts disclosed in that case, it is very certain that the agent of this Crayon Company was liable to the State of Alabama for a tax which was laid directly on selling picture frames.

It is well to note the facts in the case of Rearick v. Commonwealth of Pa. 203 U. S. 506. A municipal ordinance exacted a license for soliciting orders within the municipality. Rearick was employed by a foreign corporation to solicit orders for groceries, which the company filled by shipping goods to him for the delivery to and collection of the purchase price from the customer who had the right to refuse the goods if not equal to the sample, such goods always being shipped in distinct packages corresponding to the several orders except in the case of brooms, which after being tagged and marked *like the other articles according to the number ordered*, were then tied together in bundles for convenient shipment. "No shipments were made to the defendant (Rearick) except to fill such orders and no deliveries were made by him except to the parties named on the packages." In the course of the opinion Mr. Justice Holmes said : "The fair meanning of the agreed fact that the orders were given to agents employed to solicit them *is that the company offered the goods, and that the orders were acceptances of offers from the other side.* If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent *at the moment when the orders were given*, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. And further, "The brooms were *specifically appropriated to specific contracts* in a practical if not in a technical sense.

Under such circumstances, it is plain that wherever might have been the title, the transportation of the brooms for the purpose of fulfilling the contracts was protected commerce." And the ordinance was properly held invalid so far as it concerned Rearick.

The facts in the case of General Oil Company v. Crane, 209 U. S. 212 are practically the same as in the case of American Steel & Wire Company v. Speed. Here oil was shipped from Pennsylvania and Ohio, designated ultimately to points in the Southwest where it was stored in Memphis as a distributing point, and was held to be liable for a State tax while in Memphis.

The plaintiff in error relies upon the case of Caldwell v. N. C. 187 U. S. 622. In that case the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent on their arrival, and that the pictures, then for the first time, *were put into their proper frames.* Orders were taken by the agents in the first instance for the pictures *and the picture frames.* It no where appears, nor is it intimatetd by either counsel or by the court, that the purchaser was permitted to make a selection of a frame after the arrival of the picture; but, to the contrary the inference results from the facts stated that a specific order was taken for a specific character of frame. Under such facts, the transaction was, of course, interstate commerce. The case is quite different from the present one, and is not in the slightest degree opposed to our position.

Counsel for plaintiff in error make the contention that the statute violates section one of the Fourteenth Amendment of the Constitution in that it discriminates against the rights and privileges of citizens of other States. No authority is cited by counsel in support of this contention and we apprehend that none can be cited. The statute does not apply to merchants or dealers having a permanent place of business in this State and keeping picture frames as a part or all of their stock in trade. All persons

who have a permanent place of business in this State and keep picture frames as a part or all of their stock in trade come within the statute. Those merchants of this State who do not keep picture frames as a part or all of their stock in trade, but who solicit orders for picture frames are subject to the license, alike with agents of foreign corporations. And, said Judge Denson in the case at bar, "It is too clear for argument that any merchant whether he resides in the State or out of it, may be exempt from the license, provided he has a permanent place of business in the State and keeps picture frames as a part or all of his stock in trade." See also Emert v. Missouri, 156 U. S. 296.

But the Supreme Court of Alabama has construed the statute, as before pointed out, as not discriminating for or against any merchant or class of merchants, and this is conclusive on this court. As said with respect to a statute of the State of Tennessee, in American Steel & Wire Co. v. Speed, 192 U. S. 500, 523, "As that statute has been construed by the State court as applying to all merchants and as embracing alike all persons engaged in the character of business in which the Steel Company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination."

We respectfully submit that the judgment of the Supreme Court of Alabama should be affirmed.

ALEXANDER M. GARBER,
Attorney General.

THOMAS W. MARTIN,
Assistant Attorney General.

DOZIER *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 105. Submitted January 25, 1910.—Decided May 31, 1910.

The protection of the commerce clause of the Federal Constitution extends beyond the strict lines of contract, and inseparable incidents of a transaction of interstate commerce based on contract are also interstate commerce.

Where, under the contract to purchase a picture, the purchaser has the option to take at a specified price the frame in which the picture shall be delivered, and both picture and frame are manufactured in and delivered from another State and remain the property of the vendor until paid for, the sale of the frame is a part of the original transaction and protected by the commerce clause of the Constitution.

The imposition of a license tax for soliciting orders for enlargements of photographs and frames on persons not having a permanent place of business in the State and keeping such articles as stock in trade is a regulation of commerce between the States and void under the commerce clause of the Federal Constitution, both as to the orders for the picture itself and as to an optional right to take, at a price specified in the contract, the frame in which the picture is delivered, and so *held* as to the license tax imposed under § 17 of the statute of March 7, 1907, of Alabama.

154 Alabama, 83, reversed.

THE facts are stated in the opinion.

Mr. A. D. Gash for plaintiff in error:

Congress has sole power to regulate commerce between the States. Art. I, § 8, Const. U. S. Section 17 of the

Alabama act of March 7, 1907, requiring every person who solicits orders for pictures or frames or sells or disposes of picture frames to pay a license tax in each county is an attempt to interfere with and to regulate commerce and as such is invalid as to an agent of a corporation residing out of the State. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Brenan* v. *Titusville*, 153 U. S. 289; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Lyng* v. *Michigan*, 135 U. S. 161; *Crutcher* v. *Kentucky*, 141 U. S. 47; *The State Freight Tax*, 15 Wall. 232; *Brown* v. *Maryland*, 12 Wheat. 419; *Stockard* v. *Morgan*, 185 U. S. 27.

No State has a right to abridge the privileges of citizens of other States or to discriminate in its laws against the rights and privileges of citizens of the other States, Art. XIV, § 1, Const. U. S., and § 17 does discriminate against the rights and privileges of citizens of the other States.

An agent of a foreign corporation who delivers a frame to each purchaser of portraits whose contract of purchase provides that the portrait will be delivered in a suitable frame that may be accepted at factory price, who has only one frame fitted to and surrounding each portrait as it is delivered and who does not offer to sell any frame to others than those whose contract calls for the option of accepting said suitable frame and who carries no extra frames whatever, but keeps the title for his company or returns to his company any frame that is refused is engaged solely in interstate commerce. *Chicago Portrait Co.* v. *Mayor of Macon*, 147 Fed. Rep. 967; *State* v. *Coop*, 52 So. Car. 908; *City of Laurens* v. *Elmore*, 55 So. Car. 477.

The mere fact that the purchaser may refuse to accept the frame does not deprive the transaction of its qualities of interstate commerce.

Mr. Alexander M. Garber, Attorney General of the State

of Alabama, and *Mr. Thomas W. Martin* for defendant in error:

Although an agent from without the State cannot be convicted for soliciting orders for the enlargement of pictures because the taking of the orders therefor and the delivery thereof in pursuance of the order-contract, constituted interstate commerce, in this case as held by the state court the sale of the frames was made and completed in Alabama by the agent, after the frames were brought into the State, and while in the possession of the agent and, therefore, the transaction with respect to the frames was not *inter*state but *intra*state commerce. The conviction, therefore, should be sustained under the latter alternative in the complaint. The question has not been decided by this court. *State* v. *Montgomery*, 52 Maine, 433; *Chrystal* v. *Mayor*, 33 S. E. Rep. 810. And see also *Machine Company* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Rearick* v. *Commonwealth of Pennsylvania*, 203 U. S. 506; *General Oil Co.* v. *Crane*, 209 U. S. 231. See also dissenting opinions in *State* v. *Coop*, 52 So. Car. 908, and *City of Laurens* v. *Elmore*, 55 So. Car. 477.

Stripped of all its technicalities, the transaction in this case resolves itself into a shipment of the picture frames by the manufacturer to its agent in another State there to be sold without any order from any person for such frames and in such cases the agents are liable in each case for the payment of the license tax. *Machine Company* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296. See also *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *General Oil Co.* v. *Crane*, 209 U. S. 212. *Rearick* v. *Pennsylvania* does not apply.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted and sentenced to a fine on a complaint for breach of an Alabama statute of

March 7, 1907. By § 17 of that act a license tax was imposed on persons who did not have a permanent place of business in the State and also keep picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The Chicago Crayon Company, having its only place of business in Chicago and being engaged in the business of making and enlarging portraits from photographs and in the manufacturing of picture frames, solicited orders in Alabama without paying the license tax. These orders were given in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued, "I understand that my portrait is to be delivered in an appropriate frame which this contract entitles me to accept at factory price." The agent of the company gave back a written acceptance, repeating the other terms of the bargain and adding, "all portraits are delivered in appropriate frames, which this contract entitled the purchaser to accept at factory prices," with particulars purporting to show that these prices were from one-third to one-half the retail or usual ones. The plaintiff in error, who also had no permanent place of business in Alabama and had paid no license tax, was an agent of the company who delivered pictures and frames and collected for them in pursuance of the agreed plan. The pictures and frames were sent to the agent and remained the property of the company until paid for and delivered. On these facts the Supreme Court of Alabama, while admitting that the dealings concerning the pictures were commerce among the States, sustained the conviction on the ground that the sale of the frames was a wholly local matter. 154 Alabama, 83.

No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it

took place wholly within the State of Alabama, if a sale was made. But as was hinted in *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the company and factory were in Chicago, obviously it was contemplated if not agreed that the frame should come on with the picture. In fact the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous and one, at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions the statute as applied to this case is a regulation of commerce among the States, and void under the Constitution of the United States. Art. I, § 8. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. *Caldwell* v. *North Carolina*, 187 U. S. 622. *Rearick* v. *Pennsylvania*, 203 U. S. 507.

Judgment reversed.